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# State v. Kelly Appellant's Brief Dckt. 44195

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44195
Plaintiff-Respondent,	)	
	)	KOOTENAI COUNTY NO. CR 2004-10433
v.	)	
	)	
JAMES DOUGLAS KELLY,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

James Douglas Kelly appeals from the district court's order revoking his probation. On appeal, Mr. Kelly contends that the district court abused its discretion in revoking his probation after he had served nearly five years in custody.

Statement of the Facts & Course of Proceedings

In May of 2004, James Kelly became severely intoxicated after drinking a case and one-half of beer with a friend.<sup>1</sup> (PSI, pp.60, 93.) Mr. Kelly was outside a house,

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<sup>1</sup> Mr. Kelly acknowledges that he has both drug and alcohol problems. (PSI, pp.71, 153.) He wants treatment to help him deal with these addiction issues. (PSI, pp.71, 107.)

bleeding and seriously distressed, when the driver of a car passing by the house stopped to see if he needed assistance. (PSI, pp.59-60.) Mr. Kelly got into the car and wanted the driver to drive away because there were people trying to kill him. (PSI, pp.59-60, 113.) When the driver refused, they engaged in a heated argument, during which time Mr. Kelly put a telephone cord around the neck of the car's driver, and said something about killing him. (PSI, p.59.) Mr. Kelly was blacked-out drunk and had no memory of the incident whatsoever. (PSI, p.60.) The driver was not seriously harmed. (PSI, pp.72, 101.)

Based on these facts, Mr. Kelly was charged by Information with aggravated battery. (R., pp.57-58.) Two and one-half years later, he pled guilty to the aggravated battery, and the district court imposed a sentence of 15 years, with 5 years fixed, but retained jurisdiction.<sup>2</sup> (R., pp.106-110.) Mr. Kelly filed an I.C.R. 35 motion for leniency which was heard at the rider review hearing. (R., pp.111-112, 117.) The district court denied the motion for leniency. (R., pp.117, 125-126.) Following a successful rider, the court placed Mr. Kelly on probation for four years. (R., pp.119-120.)

The State filed a report of probation violation alleging that Mr. Kelly had used methamphetamine and marijuana and consumed alcohol while on probation, had moved without permission, and has associated with a person on felony probation. (R., pp.129-132.) Mr. Kelly admitted to violating some of the terms and conditions of his probation, the district court found he had violated some of the terms and conditions of

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<sup>2</sup> While this case was pending, Mr. Kelly was convicted of robbery in Washington State where he was incarcerated for two and a half years with a detainer from Idaho. (PSI, p.108.)

his probation, and the district court continued Mr. Kelly on probation, but increased the period of probation to five years. (R., pp.152-156.)

In 2008, the State filed a report of probation violation alleging that Mr. Kelly had possessed methamphetamine and drug paraphernalia and had consumed alcohol and methamphetamine while on probation. (R., pp.165-168.) Mr. Kelly admitted to violating some of the terms and conditions of his probation, and was screened for mental health court. (R., pp.194, 206-207.) Mr. Kelly's application to mental health court was denied. (R., pp.194, 206-207.) At the disposition hearing, the district court converted Mr. Kelly's supervised probation to unsupervised probation so that he could move to Washington to complete the Seattle Salvation Army Residential Treatment Program. (R., pp.206-209.) Mr. Kelly was later removed from the program and absconded. (R., p.221.) The court took into consideration the fact that Mr. Kelly had been incarcerated in Washington State until October of 2011, for nearly four years. (R., pp.215, 221-222.) The court continued Mr. Kelly on supervised probation for four years, finding that the purposes of punishment had already been served by Mr. Kelly's lengthy incarceration. (R., pp.221-220.)

In 2012, the State filed a report of probation violation alleging that Mr. Kelly violated his probation by using methamphetamine, marijuana, and alcohol, by moving without permission, by leaving the district without permission, and by failing to report to his probation officer. (R., pp.226-230.) Mr. Kelly admitted to violating the terms and conditions of his probation, and the district court ordered that Mr. Kelly serve 180 days in jail and enter mental health court, and continued him on probation. (R., pp.238, 242-245.)

Two months later, the State filed another report of probation violation, alleging that Mr. Kelly violated his probation by being terminated from his treatment program. (R., pp.251-253.) Mr. Kelly admitted to violating his probation, and the district court continued his probation with the condition that he apply for an interstate compact to Washington. (R., pp.271-275.)

In 2013, the State filed a report of probation violation alleging that Mr. Kelly had absconded from probation while living in Washington State. (R., pp.277-279.) Upon his return to Idaho, the court placed Mr. Kelly on unsupervised probation for three years and sent him back to Washington. (R., pp.287-289.)

Later in 2013, Mr. Kelly was arrested for grand theft, which was later reduced to a misdemeanor for operation of a motor vehicle without the owner's consent. (R., pp.293-94.) Mr. Kelly pleaded guilty to the misdemeanor and admitted to violating his probation. (Tr., p.123, L.17 – p.132, L.23.) At the disposition hearing, the State recommended that the court impose the underlying sentence. (Tr., p.134, Ls.9-11.) Mr. Kelly asked the court to commute his sentence based on the fact that he was a resident of Washington, he was currently on felony probation in Washington, he had a warrant from Washington and would be transported there when released from custody in Idaho, and he had been accepted into a one-year inpatient program at the Dream Center in Washington. (Tr., p.137, Ls.4-25; p.139, Ls.3-13; 144, Ls.10-20.) The court told Mr. Kelly that it was going to impose the sentence, but would retain jurisdiction and would consider terminating Mr. Kelly's probation after the rider. (Tr., p.150, L.5 – p.151, L.23.) Mr. Kelly said that he did not want to do a rider. (Tr., p.152, L.4.) The district

court revoked Mr. Kelly's probation and executed the underlying sentence of 15 years, with 5 years fixed. (R., pp.357-358.)

Mr. Kelly filed a Rule 35 motion and a hearing was held. (R., p.359.) At the hearing, Mr. Kelly requested that his sentence be commuted or he be placed on unsupervised probation so he could return to Washington to attend the Dream Center, a faith-based rehabilitation program. (Tr., p.158, Ls.16-25.) The district court denied Mr. Kelly's Rule 35 motion.<sup>3</sup> (Tr., p.166, Ls.9-10; R., p.386.)

Mr. Kelly appealed. (R., p.388.) The appeal was found to be untimely and was dismissed. (Supp. R., p.22.) Mr. Kelly petitioned in post-conviction and the Probation Violation Disposition order was re-entered. (Supp. R., pp.36-37.) Mr. Kelly filed an appeal timely from the re-entered judgment.<sup>4</sup> (Supp. R., pp.26-29, 39-43.)

### ISSUE

Did the district court abuse its discretion when it revoked Mr. Kelly's probation and executed the underlying sentence of 15 years, with 5 years fixed?

### ARGUMENT

#### The District Court Abused Its Discretion When It Revoked Mr. Kelly's Probation And Executed His Underlying Sentence Of 15 Years, With 5 Years Fixed

In light of the significant progress Mr. Kelly made during the seven years he was on probation, his most recent probation violations did not justify revoking probation.

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<sup>3</sup> The district court considered Mr. Kelly's second Rule 35 motion for leniency; however, Mr. Kelly does not assert on appeal that the district court erred in denying the second Rule 35 motion as the Court of Appeals in *State v. Bottens*, 137 Idaho 730 (Ct. App. 2002), made clear that the district court does not have jurisdiction to hear a defendant's second Rule 35 motion for leniency.

<sup>4</sup> The Notice of Appeal was filed before the judgment was re-entered but a prematurely filed Notice of Appeal is deemed timely filed by operation of I.A.R. 17(e)(2).

There are generally two questions that must be answered by the district court in addressing allegations of probation violations: first, the court must determine whether the defendant actually violated the terms and conditions of his probation; and second, if a violation of probation has been found, the trial court must then decide the appropriate remedy for the violation. *State v. Sanchez*, 149 Idaho 102, 105 (2009). “The determination of whether a probation violation has been established is separate from the decision of what consequence, if any, to impose for the violation.” *Id.* (quoting *State v. Thompson*, 140 Idaho 796, 799 (2004)). Once a probation violation has been found, the district court must determine whether it is of such seriousness as to warrant revoking probation. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). However, probation may not be revoked arbitrarily. *State v. Adams*, 115 Idaho 1053, 1055 (Ct. App. 1989). The district court must decide whether probation is achieving the goal of rehabilitation and whether probation is consistent with the protection of society. *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001). If a knowing and intentional probation violation has been proved, a district court’s decision to revoke probation will be reviewed for an abuse of discretion. I.C. § 20-222; *Leach*, 135 Idaho at 529.

Only if the trial court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society, may the court imprison a probationer who has made sufficient, genuine efforts to obey the terms of the probation order. *State v. Lafferty*, 125 Idaho 378, 382 (Ct. App. 1994).

The district court has shown a history of commitment to Mr. Kelly’s rehabilitation. However, the bulk of Mr. Kelly’s legal issues are now in Washington. At the disposition

hearing, the district court believed the appropriate sentence for Mr. Kelly was a rider. (Tr., p.150, Ls.13-25.) The district court also stated that if Mr. Kelly completed a rider, the court would consider terminating his probation, closing his Idaho case, and sending him to Washington. (Tr., p.151, Ls.1-13.) Mr. Kelly was having a difficult day and impulsively declined the rider, resulting in the court imposing the original sentence. (Tr., p.164, Ls.1-6.) In hindsight, Mr. Kelly realized that if he successfully completed a rider and was released, he would simply go into custody in Washington, which would allow him to ultimately attend the Dream Center. (Tr., p.164, Ls.7-14.)

Mr. Kelly is a resident of Washington and, prior to the imposition of the current sentence, he was only on unsupervised probation in Idaho. (Tr., p.139, Ls.3-6.) He is also on supervised felony probation and has a detainer out of Washington. (Tr., p.137, Ls.4-25, p.139, Ls.3-13.) On appeal, he maintains that it simply makes no sense for him to serve a lengthy prison sentence in Idaho for a crime that he committed 11 years ago, when the court could end his supervision here and send him to Washington to continue his rehabilitation. Mr. Kelly has struggled with his probation, but his violations have all been related to his substance abuse. (*See generally*, R.) He has been under the continuous supervision of the State of Idaho in some form or another since at least 2004, which does not appear to be a prudent use of resources. Mr. Kelly believes that the Dream Center is the right program for him and he is motivated to attend the program. (Tr., p.144, L.15 – p.145, L.1.)

Given his clear ties to Washington, the substantial amount of time he has been incarcerated on this offense, and the fact that he is already on felony probation in Washington, execution of his prison sentence in Idaho was unnecessary. Therefore,



Mr. Kelly asserts that the district court abused its discretion when it revoked his probation and executed the underlying sentence.

### CONCLUSION

Mr. Kelly respectfully requests that his case be remanded to the district court with an instruction that he be returned to probation or, in the alternative, for a new probation disposition hearing.

DATED this 23<sup>rd</sup> day of November, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
SALLY J. COOLEY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of November, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

JAMES DOUGLAS KELLY  
INMATE #59979  
ICIO  
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JOHN T MITCHELL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

EDWARD J LAWLOR  
KOOTENAI COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

SJC/eas